2003

State of Utah v. Ron Dennis Shepherd : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20030863-CA
RON DENNIS SHEPHERD,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION ON ONE COUNT EACH OF BURGLARY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-6-202 (WEST 2004) AND THEFT, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. §76-6-404 (WEST 2004), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR WASATCH COUNTY, THE HONORABLE DONALD J. EYRE, PRESIDING

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction on one count each of burglary, a second degree felony, and theft, a class B misdemeanor (R. 208-10). This court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e)(West 2004).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Did the district court correctly conclude that the eyewitness testimony of the burglary victim was constitutionally reliable and, therefore, admissible at trial?

"In reviewing the trial court's decision to admit [evidence of an eyewitness identification]," this Court "defer[s] to the trial court's fact-finding role by viewing the facts in the light most favorable to the trial court's decision

to admit and by reversing its factual findings only if they are against the clear weight of the evidence." State v. Ramirez, 817 P.2d 774, 782 (Utah 1991). This Court reviews for correctness the trial court's determination that "the[] facts are sufficient to demonstrate reliability." Id.

2. Can defendant prevail on his claim of ineffective assistance of counsel where he has not shown that his trial counsel performed deficiently by not submitting to the court the name, resume, and expected testimony of an expert on eyewitness testimony or that he suffered demonstrable prejudice as a result?

In reviewing claims of ineffective assistance of counsel, this Court must determine whether trial counsel's performance was deficient and, if so, whether the deficient performance prejudiced defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Oliver, 820 P.2d 474, 478 (Utah App. 1991). This claim presents a question of law, reviewed on the record of the underlying trial. See State v. Litherland, 2000 UT 76, ¶¶ 16-17, 12 P.3d 92.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No constitutional provisions, statutes, or rules are dispositive.

STATEMENT OF THE CASE

Defendant was charged with one count each of burglary and possession or use of a controlled substance, both second degree felonies; and one count each of theft and possession of drug

paraphernalia, both class B misdemeanors (R. 5-6). Before trial, he filed a motion to suppress eyewitness identification testimony, which the trial court denied after a hearing (R. 54-63; R. 131-36 at addendum A; R. 261). A jury subsequently convicted defendant of the burglary and theft charges (R. 192-93). The court sentenced him to a suspended term of one-to-fifteen years in the Utah State Prison on the felony charge, and 180 days in jail on the misdemeanor, with credit for time served (R. 208-10). The court also ordered 100 hours of community service, a fine, and 36 months on probation with certain conditions imposed (Id.). Defendant filed this timely appeal (R. 222).

STATEMENT OF THE FACTS

Just after midnight on June 24, 2004, Mark Hartman, newly arrived home from a business trip, picked up his two teenaged children and drove to his home in Midway, which was in the process of being remodeled (R. 256: 70-71). As the family walked onto the front porch and began inspecting the new exterior construction, Hartman suddenly saw someone wearing shorts, a t-shirt, and a backpack run out the back door (Id. at 73-75). Hartman chased the man until he lost him, and then returned home (Id. at 75-76).

Hartman and the children entered the home through the back door (Id. at 76). Hartman immediately noticed that the refrigerator doors were open and a gallon of milk sat atop the

refrigerator (Id.). Upstairs, he found part of his computer on the hallway floor (Id.). In Hartman's bedroom, dresser drawers had been emptied, and all his clothing had been pulled from his closet (Id. at 77). A half gallon of ice cream, with a spoon stuck in it, rested on a chest of drawers (Id).

Hartman took the children outside and called 911 on his cell phone (Id. at 78). As he finished the call, he saw a second man exit the home (Id.). This man wore shorts and a t-shirt and had a towel draped over his head like a bonnet, concealing his face (Id. at 79). Hartman yelled at him, and the man yelled back, making "a gesture with his arm as though he was carrying a weapon" (Id. at 80).[1] Hartman immediately directed his children to move slowly towards the car (Id.). Hartman himself carefully backed up, keeping his eyes on the man. When he was out of sight, Hartman dashed to the car (Id. at 81).

With his family safely in the car, Hartman was about to drive off when he saw the same man, wearing a backpack, with the towel still draped over his head, come around the house on a bicycle and ride directly past him onto the street (Id. at 81-82). Hoping the police would arrive soon, Hartman decided to follow him (Id. at 82, 84). As Hartman closed in on him, the man "turned on his bike, and acted as though he was going to shoot at my windshield" (Id. at 84). When the man made the same motion a

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[1] Because it was dark, Hartman could not tell what the man was holding (R. 256: 80).

second time, Hartman "hit the back of the bicycle" with his car (Id.). The man fell off his bicycle, and the towel fell from his head (Id. at 85). Defendant stood up and retrieved his bicycle (Id. at 86). Hartman testified that he had a good view of defendant:

> I had the high beams on on [sic] my vehicle. After I hit the individual, when he went to stand up, I had a very, very good view of him standing right in front of me, right in front of my car. It was like as though he were a deer in the headlights, and he was dazed also.

Id. Hartman testified that defendant was not pointing anything at him during this time (Id. at 87). Hartman's attention was focused, the man was not more than a few feet beyond the hood of his car and, in addition to the car's high beams, a nearby street light illuminated the scene (Id. at 87-88, 101-02).

Defendant picked up his bicycle and then noticed that the back tire was nonfunctional. He dropped the bike and ran off (Id. at 86). The police arrived shortly thereafter. Despite a search, they could not locate either man that night (Id. at 171).

Around 7:15 in the morning, a patrol officer located a possible suspect walking down the roadway less than half a mile from the burglarized home (Id. at 172). The suspect at first denied any involvement in the burglary but then quickly confessed and named defendant as his co-burglar (Id. at 111, 130, 136-37).

The suspect, Dustin Ward, testified at trial.[2] He described buying methamphetamine from defendant in Salt Lake, deciding with defendant to go mountain biking around Midway, driving to The Homestead parking lot in a truck belonging to a friend who was a federal fugitive, and smoking methamphetamine along the way (Id. at 118-21, 137). He further testified to seeing a house under construction, riding over to it, climbing in a window, opening the door for defendant, removing a Coke from the refrigerator, and exploring the upstairs of the house (Id. at 122-25).

Ward confessed to taking a pair of binoculars and a knife from the bedroom closet and said he saw defendant take a small TV (Id. at 125-26). He also saw defendant unhooking a computer because "[h]e wanted the lower part of [it]" (Id. at 127). Ward eventually went downstairs to retrieve his Coke. He heard voices, looked out the window, heard voices again, whistled a warning to defendant, and then ran away (Id. at 128). Ward spent the rest of the night in a nearby new home under construction. He was apprehended about twenty minutes after leaving the home the next morning (Id.).

Officer Winterton, the investigating officer, responded to the scene of the burglary shortly after Mark Hartman called 911. Winterton saw the damaged bicycle and found a backpack nearby. In the backpack was a small TV, a key ring without any keys but

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[2] Ward was a convicted felon, serving a prison term at the time he testified (R. 256: 108, 134-35). He was on probation at the time of the burglary (Id. at 130).

with the name "Ron" on it and, apart from the key ring, the keys to the truck parked at The Homestead (Id. at 166-69). Police also found defendant's cell phone in the roadway near the bicycle (Id. at 169-70).[3]

Just after 7:00 the next morning, Winterton witnessed the arrest of Dustin Ward, whom he interviewed later that morning at the sheriff's office (Id. at 171, 173). Winterton testified that Ward's trial testimony was consistent with what Ward had told him in the interview (Id. at 173).

Three days after the burglary, based on his interview with Dustin Ward, Officer Winterton found a photograph of defendant online, printed it, and telephoned Mark Hartman (Id. at 174). Winterton "asked if [Hartman] could come to the sheriff's office and look at some pictures, see if he could identify the individual that he had seen, that he had stated he knocked off his bicycle" (Id.). At the sheriff's office, Hartman remembered seeing "more than one photograph" (Id. at 105). He remembered Winterton showing him two or three photos sequentially (Id. at 106). Both Hartman and Winterton testified that the officer showed Hartman one or two photographs and that Hartman did not recognize the man on the bicycle in those photos. (Id. at 105-06, 175). Winterton then presented the photo of defendant, to

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[3] Defendant maintained that either Dustin Ward had stolen the cell phone from him or that he "lost it" in his friend's truck (Id. at 170).

which Hartman responded "immediately" and with 95% surety (Id. at 176). Winterton testified that he did not compile a traditional photo array in this case "[b]ecause I had the co-defendant give me the name of the suspect right out of the chute, within minutes of him being detained. I was asking Mr. Hartman to confirm what I believe I already knew" (Id. at 178; accord R. 261: 6).

Although defendant presented several alibi witnesses, all of whom testified that he was at his mother's home enjoying a barbecue when the burglary occurred and that he left only long enough to purchase beer from a nearby grocery store, the jury nonetheless convicted him of burglary and theft (Id. at 210, 218; R. 257: 8-9, 11).

SUMMARY OF ARGUMENT

Defendant contends that his conviction was primarily based on an unreliable and inadmissible photo identification by the victim. Without this eyewitness identification to bolster the testimony of co-burglar Dustin Ward, defendant asserts that the jury would have been more likely to believe his alibi witnesses and, consequently, to render a more favorable verdict. When the eyewitness identification is analyzed under the Ramirez factors, however, one conclusion becomes inescapable. Despite a less than optimal photo identification procedure, the totality of the factors bearing on reliability clearly demonstrate that the identification was at least as reliable as the Ramirez

identification. Consequently, the trial court did not err in admitting that evidence.

Defendant also contends that he received ineffective assistance of counsel because his attorney failed to submit the name, resume, and expected testimony of an eyewitness identification expert. This claim fails on both prongs of the ineffectiveness analysis. As to deficient performance, defense counsel may have rationally decided it would be more tactically advantageous to rely on the police officer's testimony that he did not follow standard procedure in presenting the photos to the witness and on the cautionary jury instruction than on a proffer from an expert that counsel knew the court was likely to reject. As to prejudice, defendant merely alleges it speculatively, with no record support. For these reasons, his ineffective assistance claim fails.

ARGUMENT

POINT ONE

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE EYEWITNESS TESTIMONY OF THE BURGLARY VICTIM WAS CONSTITUTIONALLY RELIABLE AND, THEREFORE, ADMISSIBLE AT TRIAL

Defendant argues that his conviction "was primarily based" on unreliable and, hence, inadmissible eyewitness identification testimony from the burglary victim (Br. of Aplt. at 18). Without this "critical" testimony, he contends, the jury would have found Dustin Ward's testimony less credible and his alibi witnesses

more credible, thus creating a "reasonable possibility" of a more favorable outcome (Id. at 26).

The Utah Supreme Court has articulated the proper analytical framework for determining whether, under the totality of the circumstances, an eyewitness identification is constitutionally reliable and, hence, admissible. See State v. Ramirez, 817 P.2d 774, 781 (Utah 1991). The reliability analysis, rooted in due process, addresses five "areas of concern":

> 1) the opportunity of the witness to view the actor during the event;
> 2) the witness's degree of attention to the actor at the time of the event;
> 3) the witness's capacity to observe the event, including his or her physical and mental acuity;
> 4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and
> 5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

State v. Long, 721 P.2d 483, 493 (Utah 1986). "If the court finds the identification reliable in light of these five factors, then it is admissible under the Due Process Clause of the Utah Constitution." State v. Nelson, 950 P.2d 940, 943 (Utah App. 1997). Moreover, if "the factors bearing on reliability clearly indicate that the identifications . . . were at least as reliable as the identifications in Ramirez," then this Court will "conclude that admission of the eyewitness identifications . . .

[does] not violate [defendant's] right to due process." State v. Hollen, 2002 UT 35, ¶ 64, 44 P.3d 794.[4]

Here, the trial court held a pre-trial hearing on the constitutional reliability and admissibility of Mark Hartman's eyewitness testimony (R. 261). It entered extensive findings of fact, which included findings addressing the five analytical factors. See R. 132-35 at addendum A. The court concluded that although "[t]he [photographic identification] procedure used was not optimal," nonetheless, "under the totality of the circumstances, the identifications are sufficiently reliable to be admitted as evidence at trial" (R. 131 at addendum A). The trial court did not err. The reliability factors in this case, considered in their totality, demonstrate that Mark Hartman's identification of defendant as the man who exited his home and rode in front of him on a bicycle far exceeded the reliability of the identification in Ramirez.

1. Opportunity of witness to view the actor during the event.

The Ramirez Court articulated several circumstances that are pertinent to this factor. See Ramirez, 817 P.2d at 782.

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[4] Defendant also claims that admitting the eyewitness testimony violated his federal constitutional rights. See Br. of Aplt. at 26. While defendant inadequately briefs this issue, it can nonetheless be disposed of easily. In Ramirez, the Utah Supreme Court stated, "[W]e think that our article I, section 7 analysis is certainly as stringent as, if not more stringent than, the federal analysis required by [Neil v. Biggers, 409 U.S. 188 (1972)]." 817 P.2d at 784. As a result, even had defendant briefed the issue, a separate federal analysis would not be necessary.

a. Length of time and distance from which witness viewed the actor.

In Ramirez, the witness testified that he viewed the actor for "a 'few seconds' or 'a second' to 'a minute' or longer." 817 P.2d at 782. Although the eyewitness stated that he viewed the actor from a distance of about ten feet, another witness indicated the distance may have been as much as thirty feet. Id.

In this case, the trial court specifically found that "Mr. Hartman was able to watch the suspect for several seconds as the suspect stood directly in front of the headlights, apparently trying to figure out what to do. During this process, the suspect also looked directly at Mr. Hartman for a few seconds" (R. 134 at addendum A). Hartman testified that he was driving the car, and the suspect was directly in front of the car, a distance of approximately 6-7 feet (R. 256: 88). These circumstances are at least as favorable as those in Ramirez.

b. Capability to view the actor's face.

In Ramirez, a scarf "cover[ed] most of [the actor's] face." 817 P.2d at 776. The eyewitness could only observe the actor's eyes and note that they were small. Id. at 782. Here, defendant held a towel around his head until Hartman hit his bicycle. Then the towel fell off, and defendant's face was fully visible (R. 256: 85-86). This factor is also more favorable than in Ramirez.

c. Lighting.

In Ramirez, the eyewitness observations occurred at nighttime in a parking lot. 817 P.2d at 776. Witnesses described the lighting variously as "good" and as "poor" and stated that "the gunman was in a shadowy area." Id. at 783. In this case, the trial court found that the victim's high beams were shining directly on defendant, giving the victim a clear view of defendant's illuminated face (R. 134 at addendum A; R. 256: 86). In addition, a street light was shining directly over the point of impact (Id. at 87, 101). This factor is significantly more favorable than Ramirez.

d. Distractions.

Defendant contends that "there can be no question that" the victim was distracted by the presence of his teenaged children on the floor in the backseat of the car and by defendant pointing an unknown object at him (Br. of Aplt. at 23). The record provides no evidentiary support for defendant's speculation about the children. As for the possibility of a gun, Hartman testified that although he was "scared," he was also very "focused" (R. 256: 89). In any event, the possibility of a gun created a less significant distraction than the unequivocal presence of a real gun wielded by a second robber in Ramirez. 817 P.2d at 776; see also Hollen, 2002 UT 35, ¶ 35 (presence of second perpetrator increases distraction level of eyewitness).

2. Degree of attention.

Hartman had an unobstructed view of defendant after defendant fell from his bicycle in front of Hartman's car (Id. at 85-87). At that juncture, Hartman's attention was not diverted by the threat of any weapon.[5] Indeed, Hartman characterized defendant's demeanor like "a deer in the headlights" (Id. at 86). The trial court found that at this point defendant "was non-threatening and apparently dazed" (R. 134 at addendum A).

Any diversion posed by the earlier threat of a weapon or by the presence of Hartman's children crouched quietly in the backseat of the car "pales in comparison to the diversion created by the accomplice in Ramirez, who was swinging a pipe at the witness and threatening him during the witness's observations of the defendant." Hollen, 2002 UT 35, ¶ 38 (citing Ramirez, 817 P.2d at 783).

3. Capacity to observe.

"Here, relevant circumstances include whether the witness's capacity to observe was impaired by stress or fright at the time of the observation, by personal motivations, biases, or prejudices, by uncorrected visual defects, or by fatigue, injury, drugs, or alcohol." Ramirez, 817 P.2d at 783.

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[5] Earlier in the encounter, defendant had made gestures with his hand suggesting he might have a gun (Id. at 80, 96,84, 102). Hartman conceded that at these times, he was afraid he was going to get shot (Id. at 81).

The trial judge found that "[t]here is no evidence that Mr. Hartman was impaired by any visual defects, fatigue, drugs, or alcohol" (R. 132-33). This comports with Hartman's testimony that his vision was good, that he was not tired because he had slept on the plane ride home, and that he had not consumed any drugs or alcohol that day (R. 256: 89). He conceded that while the situation scared him, it also increased his focus on the perpetrator (Id. at 87).

The circumstances in Ramirez presented far greater concerns that fear, stress, or injury affected the witness's capacity to observe. There, one robber struck the eyewitness with a pipe and told a second assailant, in the eyewitness's presence, to shoot and kill him if he caused any further problems. 817 P.2d at 776, 783.

4. Spontaneity, consistency, and suggestibility of the identification.

Multiple circumstances are relevant to this factor. See Ramirez, 817 P.2d at 783.

a. Length of time between observations and identification.

Here, Hartman observed defendant just after midnight on June 24th and identified his photo on the morning of June 26th (R. 256: 165, 174; R. 261: 4). In Ramirez, the witness identified the actor at a show up "thirty minutes to an hour after the crime." 817 P.2d at 783. Relying on Ramirez, however, Hollen later held that a photo array identification made two months after a robbery

and a lineup identification made more than a year after the robbery were both constitutionally reliable. See Hollen, 2002 UT 35, ¶ 46.

b. Mental capacity and state of mind at the time of identification.

Hartman identified defendant in the quiet of the sheriff's office two days after the burglary (R. 133 at addendum A). The record evidence nowhere suggests that Hartman experienced any difficulty that might have impaired his ability to identify defendant or that he was under any unusual stress or agitation at the time. In contrast, the witness in Ramirez identified the actor within an hour of the robbery when, as the court opined, he might still be somewhat agitated, given the violent circumstances of the robbery. Nonetheless, the court found that "his state of mind did not otherwise influence his identification." Hollen, 2002 UT 35, ¶48 (citing Ramirez, 817 P.2d at 783).

c. Exposure to opinions, descriptions, identifications, or other information.

At the time of the Ramirez identification, "the witness knew . . . that police believed that the defendant matched the description of the suspect, and that another victim had not identified the suspect as one of the assailants." Id. at ¶ 53 (citing Ramirez, 817 P.2d at 783). Here, Hartman knew less: simply that the officer wanted to show him some photographs. The trial court found that "Sergeant Winterton did not make any comments to Mr. Hartman indicating any belief that the photograph

portrayed the same suspect seen by Mr. Hartman" (R. 132 at addendum A; R. 261: 11).

d. Instances when witness or other eyewitness failed to identify defendant.

In Ramirez, only one of three eyewitnesses was able to identify the defendant. 817 P.2d at 783. Here, Hartman, the only eyewitness, identified defendant when he first saw his picture and remained consistent in his identification thereafter. R. 256: 90-92. The trial court found that "Mr. Hartman has not wavered in identifying Defendant as the suspect" (R. 132 at addendum A).

e. Consistency of witness descriptions.

Hartman provided the police with only a minimal description of the burglar (R. 261: 17-18). His description, however, is irrelevant to the identification because the officer's undisputed testimony was that he showed Hartman the photograph based not Hartman's description but on the name Dustin Ward provided (R. 261: 5, 20).

f. Suggestibility of circumstances under which defendant was presented to the witness for identification.

Here, Officer Winterton showed defendant 2-3 photos, one at a time (R. 256: 105-06, 175). Because the officer did not compile a traditional photo array, the court found that the identification procedure was "essentially a photographic 'show-

up'" (R. 133 at addendum A).[6] The court concluded that although "[t]he procedure used was not optimal," that factor alone was insufficient to render the identification constitutionally unreliable. R. 131 at addendum A.

In comparison, the supreme court in Ramirez highlighted the "blatant suggestiveness" of the showup in that case, describing it as "troublesome," and yet still concluding that the evidence was admissible. Ramirez, 817 P.2d at 784. The identification occurred "on the street in the middle of the night. Ramirez, with dark complexion and long hair, was the only person at the showup who was not a police officer." Id. He "stood with his hands cuffed to a chain link fence behind his back. The headlights of several police cars were trained on him." Id. Despite these highly suggestive circumstances, the supreme court held that the identification was constitutionally reliable.

5. Nature of the event.

Under this factor, a court should consider "'whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.'" Id. at 781 (quoting Long, 721 P.2d at

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[6] At the suppression hearing, the court characterized the procedure as "a show up without the real person" (R. 261: 27). For purposes of determining the threshold legal question of reliability, however, this characterization is not dispositive. All eyewitness identifications are measured against the same factors regardless of the particular police protocol employed. See, e.g., State v. Hollen, 2002 UT 35, 44 P.3d 794 (lineup); State v. Hubbard, 2002 UT 45, 48 P.3d 953 (photo array); State v. Ramirez, 817 P.2d 774 (1991)(showup).

493). In Ramirez, the witnesses' attention was focused by their awareness of a robbery in progress. Here, Hartman knew his home had been burglarized. These circumstances are essentially the same. In Ramirez, however, the witnesses and the actor were of different races, while here, the trial court found that Hartman and defendant were of the same race (R. 133 at addendum A).

In sum, after comparing the facts of this case to those in Ramirez, the trial court correctly concluded: "The [photo identification] procedure was not optimal. Nonetheless, under the totality of the circumstances, the identifications are sufficiently reliable to be admitted as evidence at trial" (R. 131 at addendum A). Accordingly, defendant's claim fails. See Hollen, 2002 UT 35, ¶ 64 ("the factors bearing on reliability clearly indicate that the identification[] in this case [was] at least as reliable as the identification in Ramirez. Accordingly, . . . admission of the eyewitness identification into evidence did not violate [defendant]'s right to due process under Article I, Section 7 of the Utah Constitution."

POINT TWO

DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS WHERE HE HAS DEMONSTRATED NEITHER DEFICIENT PERFORMANCE BY HIS TRIAL COUNSEL NOR PREJUDICE RESULTING FROM THAT PERFORMANCE

Defendant argues that his trial counsel rendered ineffective assistance by failing to provide the court with the name, resume, and expected testimony of an eyewitness identification expert

whom defense counsel wanted to call as a witness. See Br. of Aplt. at 27. He asserts that he was harmed by his counsel's omission because, given the strength of Mark Hartman's eyewitness testimony, "[t]he eyewitness expert very likely may have made a difference with an explanation of the fallibility associated with eyewitness testimony" (Br. of Aplt. at 28).

To prevail on an ineffective assistance of counsel claim, defendant must demonstrate that his counsel's performance was so deficient as to fall below an objective standard of reasonableness and that, but for the deficient performance, a reasonable probability existed that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Templin, 805 P.2d 182, 186-87 (Utah 1990). Defendant's claim fails on both prongs of the ineffectiveness test.

When assessing deficient performance, "a[n appellate] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Taylor, 947 P.2d 681, 685 (Utah 1997)(quoting Strickland, 466 U.S. at 689). "If a rational basis for counsel's performance can be articulated [this Court] will assume counsel acted competently." State v. Tennyson, 850 P.2d 461, 468 (Utah App. 1993). "[A]n ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." Id.

In this case, defense counsel argued at the suppression hearing that he should be permitted to have an expert witness testify about "what's wrong with what [the police] did" in conducting the identification procedure (R. 261: 30). In response, the court noted that Officer Winterton planned to admit that he did not "follow correct police procedure with respect to identification" and that, in addition, the jury would receive a cautionary jury instruction warning that the reliability of eyewitness identification is "not that good" (Id. at 30; R. 33, 34; see also R. 238-41 at addendum B).

When defense counsel continued to advocate for an expert, the court responded, "And I know, I assume I know who you would call. I've heard his testimony probably three or four times. And I, I don't really think his testimony is helpful to the jury" (Id. at 33). Defense counsel pressed on, leading the court to finally end the discussion by stating, "What I'm going to do . . . on that particular issue is[,] I want you to designate who you . . . anticipate you would call. I want you to include . . . the CV and . . . a report as to what he would testify to" (Id. at 35).

Trial counsel did not pursue this invitation, inaction that defendant construes as deficient performance. Defense counsel, however, might well have chosen not to pursue the expert witness for tactical reasons. The court's remarks indicated it was not particularly receptive to the utility of expert testimony in this

area. Indeed, it had suggested that expert testimony would only be duplicative of both the officer's own admission that he had not followed police protocol and of the lengthy, cautionary, eyewitness identification jury instruction. See R. 261: 33. Under such circumstances, defense counsel might well have thought it better trial strategy to rely on the cautionary instruction, the officer's testimony, and his own closing argument rather than bring before the court a proffer from an expert that the court was disinclined to accept and which was well within its discretion to reject. See State v. Butterfield, 2001 UT 59, ¶43, 27 P.3d 1133 (trial court does not abuse its discretion when it refuses to admit expert testimony that would be "in the nature of a lecture to the jury as to how they should judge the facts"); State v. Hubbard, 2002 UT 45, ¶16, 48 P.3d 953 ("[A] trial court's refusal to admit evidence [does] not constitute an abuse of discretion when proffered expert testimony would amount to a lecture to the jury as to how they should weigh testimonial evidence"). Where, as here, a rational basis for defense counsel's tactical choice can be articulated, defendant's claim of deficient performance fails. See Tennyson, 850 P.2d at 468.

Defendant has also failed to demonstrate any prejudice flowing from his counsel's alleged error in not submitting the credentials and proposed testimony of his expert witness. "To show prejudice under the second component of the [ineffectiveness] test, a defendant must proffer sufficient

evidence to support 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Parsons v. Barnes, 871 P.2d 516, 522 (Utah 1994)(quoting Strickland, 466 U.S. at 694).

Defendant's claim fails from the outset because he has not proffered any record evidence that would undermine confidence in the jury's verdict. Because neither the record nor his appellate brief details the substance of the proposed expert testimony, this Court has no basis upon which to judge whether that testimony would have amounted to anything more than a generalized lecture to the jury about how to judge the credibility of the eyewitness. Where defendant has wholly failed to demonstrate that the expert's testimony would have been admitted and, had it been admitted, that it would likely have made a difference to the outcome of the case, his claim of prejudice fails. "On many occasions, this court has reiterated that proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." Fernandez v. Cook, 870 P.2d 870, 877 (Utah 1993)(footnote omitted). Without demonstrable proof of the substance of the expert's testimony, defendant's allegation of prejudice stands as an unadorned and speculative claim. State v. Arguelles, 921 P.2d 439, 441 (Utah 1996). Consequently, it fails.

CONCLUSION

For the reasons stated, this Court should affirm defendant's convictions for one count each of burglary, a second degree felony, and theft, a class B misdemeanor.

RESPECTFULLY submitted this 19th day of November, 2004.

MARK L. SHURTLEFF
Attorney General

JOANNE C. SLOTNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Kimberly D. Washburn, attorney for appellant, 405 East 12450 South, Suite A, P.O. Box 1432, Draper, Utah 84020, this 19th day of November, 2004.

Joanne C. Slotnick

Addenda

Addendum A

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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR WASATCH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. RON DENNIS SHEPHERD, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION Case No. 021500129 Judge Donald J. Eyre

THE ABOVE-ENTITLED MATTER came before the Court on Defendant's motion to suppress the out-of-court and in-court identifications of the eyewitness, Mark Hartman. Defendant was present and represented by counsel, J. Bruce Savage. The State was represented by Thomas Low. Evidence was taken and arguments were heard. The Court now being fully advised in the premises, makes and enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On June 24, 2002, Mark Hartman arrived at his home in Midway, Utah, with his two children, and discovered a man coming out of his house, who thereafter fled.

2. Mr. Hartman then left his children outside, entered his home, looked around, and came back outside after confirming that his home had been burglarized.

3. While Mr. Hartman was outside, a second intruder exited the home wearing a towel over his head to obscure his face. Mr. Hartman could not see the man's face through the towel.

4. The second intruder (hereinafter "the suspect") pointed something at Mr. Hartman, which Mr. Hartman thought might be a gun, though it was too dark to be sure. Mr. Hartman told his children to get back in the car, and Mr. Hartman backed up, still facing the suspect until he turned a corner and then quickly got into his car.

5. Mr. Hartman observed the suspect leaving his home on a bicycle. Mr. Hartman followed the suspect in his car, with his high-beams illuminating the suspect. The suspect, certainly in an attempt to dissuade Mr. Hartman from following him further, pointed something backwards toward Mr. Hartman's car. In response to this perceived threat, Mr. Hartman caused his vehicle to bump the suspect's bicycle, causing the suspect to fall from the bicycle and the towel he had

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continued to wear to fall from his head.

6. After the suspect fell from the bicycle, he got up and tried to get back on the bicycle. Mr. Hartman, whose headlights were still set on high-beam, looked at and clearly saw the suspect's face. The suspect apparently discovered that his bicycle's rear wheel had been bent rendering the bicycle inoperable. Mr. Hartman was able to watch the suspect for several seconds as the suspect stood directly in front of the headlights, apparently trying to figure out what to do. During this process, the suspect also looked directly at Mr. Hartman for a few seconds. The suspect then fled on foot.

7. The following facts are pertinent in applying Ramirez's analysis to those moments after the suspect's towel fell from his head and stood in front of Mr. Hartman's vehicle:

   a. Opportunity: Mr. Hartman had a clear, unobstructed view of the suspect's face, his headlights providing direct illumination.

   b. Attention: Mr. Hartman was aware that his home had just been burglarized. The other burglar had fled previously and was no longer a distraction to Mr. Hartman. The suspect, having been violently knocked off his bicycle, was non-threatening and apparently dazed.

   c. Capacity: There is no evidence that Mr. Hartman was impaired by any

visual defects, fatigue, drugs, or alcohol.

d. Nature of the Event: Mr. Hartman was aware of the burglary of his home; and the suspect was a Caucasian, same as Mr. Hartman.

8. On June 26, 2002, Sergeant Jeff Winterton called Mr. Hartman and asked him to come to the Sheriff's Department to view a picture—essentially a photographic "show-up." Sergeant Winterton had obtained a picture of Defendant because the co-defendant in this case, Dustin Ward, had confessed to his own involvement in the burglary and had also implicated Defendant.

9. When Mr. Hartman arrived at the Sheriff's Department, Sergeant Winterton showed him the picture of Defendant and asked him if that was the person that he had knocked off the bicycle two days previous. Mr. Hartman immediately responded that it was the same person, and clarified that he was ninety-five percent sure.

10. Subsequent to this photographic identification, Mr. Hartman had no other exposures to Defendant, whether in person or by photograph, until the Preliminary Hearing held nearly five months later, on November 13, 2002. At that time he again identified Defendant as the suspect he had knocked off a bicycle.

11. Concerning the method of identification employed by Sergeant Winterton, the following facts are relevant to the "Spontaneity and Consistency (Suggestibility)"

prong of the Ramirez analysis:

a. The photographic identification occurred within two days of the burglary.

b. Only a single photograph was used.

c. The photograph was not an attempt to match a description provided by Mr. Hartman.

d. Sergeant Winterton did not make any comments to Mr. Hartman indicating any belief that the photograph portrayed the same suspect seen by Mr. Hartman.

e. Mr. Hartman's identification of Defendant as the suspect was immediate.

f. Mr. Hartman has not wavered in identifying Defendant as the suspect.

BASED ON the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Court must make a preliminary finding of threshold reliability before permitting the out-of-court and in-court identifications by Mr. Hartman to be admitted to a jury. It is the State's burden of proof. The standards for these threshold findings are set forth in State v. Ramirez, 817 P.2d 774 (Utah 1991), and its progeny.

2. In examining the facts of the present case in light of those of Ramirez, the Court concludes that the comparison is favorable.

3. The procedure used was not optimal. Nevertheless, under the totality of the circumstances, the identifications are sufficiently reliable to be admitted as evidence at trial.

BASED ON the foregoing Findings of Fact and Conclusions of Law, the Court now makes and enters the following Order.

ORDER

1. Defendant's motion to suppress the out-of-court and in-court identifications by Mr. Hartman is denied.

2. As to Defendant's request for an expert witness, he is instructed to provide the Court, within ten days, the expert's curriculum vitae and report setting forth his expected testimony, whereupon the Court will rule on the request.

DATED this ~~2nd~~ 21st day of ~~May~~ June, 2003.

BY THE COURT:

JUDGE DONALD J. EYRE

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APPROVED AS TO FORM:

_____

J. BRUCE SAVAGE, Attorney for Defendant

RULE 4-508 NOTICE

You are hereby notified that the above Findings, Conclusions, and Order will be submitted to the Court eight days from the date that it was mailed to you unless you notify counsel for the State that you object to its form.

THOMAS L. LOW

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2003, I caused to be mailed, by first class mail postage prepaid a true and correct copy of the foregoing to:

J. BRUCE SAVAGE
1790 BONANZA B 223
P.O. BOX 2520
PARK CITY, UTAH 84060

Legal Secretary

Addendum B

INSTRUCTION NO. 15

One of the most important issues in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime. If, after considering the evidence you have heard from both sides, you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

The identification testimony that you have heard was an expression of belief or impression by the witness. To find the defendant not guilty, you need not believe that the identification witness was insincere, but merely that the witness was mistaken in his belief or impression.

Many factors affect the accuracy of identification. In considering whether the prosecution has proven beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following:

(1) Did the witness have an adequate opportunity to observe the criminal actor? In answering this question, you should consider:

(a) the length of time the witness observed the actor,

(b) the distance between the witness and the actor,

(c) the extent to which the actor's features were visible and undisguised,

(d) the light or lack of light at the place and time of observation,

(e) the presence or absence of distracting noises or activity during the observation, and

(f) any other circumstances affecting the witness's opportunity to observe the person committing the crime.

(2) Did the witness have the capacity to observe the person committing the crime? In answering this question, you should consider whether the witness's capacity was impaired by:

(a) stress or fright at the time of observation,

(b) personal motivations, biases, or prejudices,

(c) uncorrected visual defects,

(d) fatigue or injury,

(e) drugs or alcohol, or

(f) by being a person of a different race from the criminal actor.

(3) Was the witness sufficiently attentive to the criminal actor at the time of the crime? In answering this question, you should consider whether the witness knew that a crime was taking place during the time he observed the actor. Even if the witness had adequate opportunity and capacity to observe the criminal actor, he may not have done so unless he was aware that a crime was being committed.

(4) Was the witness's identification of the defendant completely the product of his own memory? In answering this question, you should consider:

(a) the length of time that passed between the witness's original observation and his identification of the defendant,

(b) the witness's mental capacity and state of mind at the time of the identification,

(c) the witness's exposure to opinions, to descriptions or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his identification,

(d) any instances when the witness failed to identify the defendant,

(e) any instances when the witness gave a description of the actor that is inconsistent with the defendant,

(f) the circumstances under which the defendant was presented to the witness for identification. You may take into account that an identification made by picking the defendant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented alone to the witness. You may also take into account that identifications made from seeing the person are generally more reliable than identifications made from a photograph.

If, after considering the evidence you have heard from the prosecution and the defendant, and after evaluating the eyewitness testimony in light of the considerations listed above, you

have a reasonable doubt about whether the defendant is the person who committed the crime, you must find him not guilty. If, on the other hand, you are satisfied beyond a reasonable doubt that the defendant is the person who committed the crime, you must find him guilty.